

Aryal (Migration) [2024] AATA 167 (31 January 2024)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Tek Narayan Aryal
VISA APPLICANTS:	Mrs Min Kumari Pun Miss Barsa Purja Mr Bibek Purja
CASE NUMBER:	2202055
DIBP REFERENCE(S):	BCC2019/5741213
MEMBER:	Moir Brophy
DATE:	31 January 2024
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl 309.211 of Schedule 2 to the Regulations; and • cl 309.221 of Schedule 2 to the Regulations • with an additional direction that the secondary visa applicants meet the following: • cl 309.312 of Schedule 2 to the Regulations.

Statement made on 31 January 2024 at 3:15pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing spousal relationship – sponsor’s visits to Nepal – limited periods of cohabitation – socialising within their community – visa applicant’s family members in Australia – impact of the COVID19 travel restrictions – occasional money transfers – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65, 359

Migration Regulations 1994, Schedule 2, cls 309.211, 309.221, 309.312, 309.321; rr 1.05, 1.12, 1.15

CASES

Minister for Immigration, Local Government and Ethnic Affairs v Dhillon (8 May 1990, unreported)

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 11 January 2022 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 13 November 2019 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 309.211 because the delegate was not satisfied on the evidence before them that the visa applicant was the spouse of the sponsor as defined and was not able to meet the requirements of the Regulations.
4. The review applicant appeared before the Tribunal on 23 August 2023 and 7 November 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant. The Tribunal was assisted by an interpreter in the Nepali and English languages.
5. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

Background

6. The visa applicant is a 44-year-old female currently residing in Nepal. She was previously married in the period from 9 July 1999 to 13 June 2016 to Mr Bil Bahader Purja. There are two children of the marriage, a daughter born in 2000 and a son born in 2002. The two children are included in this application. The visa applicant arrived in Australia on 19 June 2012 as the holder of a Tourist (subclass 679) visa, and departed Australia on 3 August 2016 as the holder of a Bridging E visa. The visa applicant's parents are living in Nepal and she has a sister and brother living in Australia.
7. The review applicant, Mr Tek Narayan Aryal, is a 54-year-old male living in Sydney. He was previously married to Ms Laxmi Aryal in the period from 27 April 1993 to 14 April 2014. There are two children of the marriage, born in 1998 and 2010. The review applicant was born in Nepal and arrived in Australia on 9 November 2000 on a Temporary Work (Skilled) (subclass 457) visa. His parents are living in Nepal, as are his two sisters and two brothers.
8. At the time of the application, the parties stated they met on 10 February 2015 at a coffee shop in Park Street Sydney. The visa applicant departed Australia on 3 August 2016. The parties committed to a long-term relationship to the exclusion of all others on 17 May 2018 when their marriage was registered in Nepal.
9. The delegate who made the original decision on 11 January 2022 noted the following issues:
 - The delegate was satisfied there was some evidence as to the financial intermingling of financial resources in that the review applicant and visa

applicant had opened a joint account, but given it had only been open for a short time the delegate found it was not sufficient to support the contention the parties were in a genuine and continuing relationship.

- The delegate gave limited weight to the evidence the parties shared a joint household.
- While acknowledging there was some evidence of the social aspects of the relationship (photographs, evidence of shared time with family and friends, evidence of shared travel), the delegate was not satisfied the visa applicant and sponsor presented to family and friends as being in a genuine and continuing spousal relationship.
- The delegate was not satisfied the parties were in a committed relationship given the concerns as to the lack of credible evidence provided.

Tribunal proceedings

10. The issue in the present case is whether the visa applicant and the review applicant were in a genuine spousal relationship at the time of application and continue to be in a genuine spousal relationship at the time of this decision.
11. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the review applicant and the visa applicant.
12. At the conclusion of the hearing on 23 August 2023, the Tribunal wrote to the parties and put certain inconsistent evidence given at the time of hearing to them under s 359A of the Act. The Tribunal explained the relevance of the inconsistent information and invited the review applicant to respond to the concerns raised. The issues raised pertained to the knowledge of each of the parties about the other party's family members, where they lived and what they did.
13. The Tribunal also put the parties on notice of a s 376 Certificate on file protecting certain information from disclosure. A copy of the certificate was provided and time given for the review applicant to make submissions as to its validity. In the interests of procedural fairness, the gist of the protected information was provided to the review applicant and time was given for him to respond to the matters raised. The matters pertained to the whereabouts of the visa applicant's brother and whether accurate answers pertaining to his whereabouts had been provided at the time of application.
14. Additional time was given for the review applicant to respond to the matters raised. Additional information was provided on 11 September 2023 and has been considered by the Tribunal.
15. The parties generally gave consistent evidence about how they met, of their time living as part of one household when the review applicant visited Nepal, of their shared interests and of their respective families. The Tribunal did have some concerns about whether the prime commitment on the part of the visa applicant was to a visa to allow her to return to Australia, or to the relationship with the review applicant.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

16. Clause 309.211(2) requires that, at the time the visa application was made, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. With limited exceptions that only apply in relation to a decision to grant or not grant a Subclass 309 visa made on or after 20 August 2022, the visa applicant must continue to be the spouse or de facto partner of their sponsor at the time of the Tribunal's decision: cl 309.221. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian permanent resident.
17. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the visa applicant and review applicant's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

18. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 17 May 2018 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds that the parties are married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship

19. The review applicant lives in Sydney in a social housing unit provided by the government. He has lived in the unit since 2017. He is in receipt of a Job Seeker payment from Centrelink. He receives \$651 per fortnight. His last paid work was as a tandoori chef but he had to leave that work because of neck pain.
20. The visa applicant lives in Nepal with her children in a home owned by the review applicant. She works as a part time housekeeper and is generally supported by her parents. Her daughter is in part time work as a waitress and her son is still studying.
21. The parties do have a joint bank account in Nepal. The review applicant sends money to the visa applicant on an occasional basis to assist her with her costs. Both parties have limited incomes.
22. They do not share day-to-day household expenses, and each maintains their own bank accounts for day-to-day expenses. This is not unusual given the review applicant is in Australia and the visa applicant is in Nepal.

23. The Tribunal places some weight on this aspect of the relationship as it is indicative of parties in a genuine and continuing relationship pooling their available resources despite living in different countries.

24. *Nature of the household*

25. The Tribunal accepts that since the parties married in 2018, the review applicant has stayed with the visa applicant for around three months at the time of their marriage and then for three months in 2019 and five months in 2022/2023. The Tribunal accepts the parties stayed together as a couple during the periods the review applicant was in Nepal.
26. The parties gave consistent evidence as to the household arrangements during the periods they were together.
27. The parties gave consistent evidence about their plans to establish a joint household in Sydney and for the children of the visa applicant to live with them according to their study schedules.
28. Given the restrictions on travel imposed by the Covid-19 pandemic, the Tribunal places weight on this aspect of the relationship given the periods of cohabitation since marriage.

Social aspects of the relationship

29. The applicants provided statutory declarations (Form 888s) from two persons who knew the parties, and who had spent time with them.
30. The Tribunal accepts from the photographic evidence, the supporting documentation as to shared travels, the statements outlined above, and the parties' oral testimony at hearing, that the parties have as a couple spent time with their family and friends, and they socialise within their community as a married couple.
31. The Tribunal accepts on the evidence before it that the parties present to their family and friends as a married couple.

Nature of the persons' commitment to each other

32. Given the concerns raised by the delegate, the Tribunal carefully considered the evidence as to the nature of the commitment of both parties to the relationship. The Tribunal accepts the parties have known each other since 2015, having met at a coffee shop.
33. The Tribunal had some concerns as to the nature of the relationship, specifically given the visa applicant's visa history and the limited knowledge the parties had of each other's family, especially the review applicant's extended family in Sydney and Nepal, and the relatively rapid inception of the relationship given the limited time they had spent together. The Tribunal was mindful of the evidence given by the parties that their marriage was an intercaste marriage and the implications of that on the social acceptance afforded by the family of the review applicant to the visa applicant. The Tribunal was concerned the visa applicant was motivated by her desire for a visa and the opportunity to reunite with other family members in Australia.
34. The Tribunal was mindful of consideration of motivation in *Minister for Immigration, Local Government and Ethnic Affairs v Dhillon* (Northrop, Wilcox and French JJ, 8 May 1990, unreported), where motivations for marriage have been restated as follows:

... people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc as according to what may be described as

"community expectations". It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others.

35. The decisions of the courts referred to above make it clear that it is inappropriate for a decision-maker to draw conclusions as to the respective commitments of the parties to a marriage from a finding that the motivation for the wedding included the visa status of the parties. In the Tribunal's view, as this case demonstrates clearly, it is particularly inappropriate to draw such conclusions without first interviewing the parties and putting any concerns as to their motivation to them. The Act and Regulations provide clear guidance as to the matters that decision-makers are to consider in assessing relationships for the purposes of a Partner visa, and it is to these matters that regard must be had.
36. After carefully considering whether the evidence supported a finding that the motivation of the parties was in fact to gain a visa in the first instance, the Tribunal accepts given the timeline of the application their primary commitment was to their relationship with each other and that while a visa and the opportunity to be reunited with other family members already in Australia was a part of the equation, their commitment to each other was not dependent on the visa being granted.
37. Based on all the evidence, the Tribunal finds the parties have a commitment to each other that is consistent with them being in a spousal relationship. The Tribunal found their evidence of their concern at their continued separation, especially given the imposed limitation on travel due to the Covid-19 pandemic, to be genuine and persuasive.
38. Given the above findings, the Tribunal is satisfied that at the time the visa application was lodged and at the time of this decision, the parties are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal finds that they intend to live together in Australia and that they therefore do not live separately and apart on a permanent basis.
39. Accordingly, the Tribunal finds that the visa applicant satisfies the definition of 'spouse' in s 5F(2)(a)-(d), and that the parties are in a spousal relationship.
40. The review applicant is an Australian permanent resident.
41. Given these findings, the Tribunal is satisfied that at the time the visa application was made, and at the time of this decision, the parties were and continue to be in a spousal relationship. The Tribunal finds that the visa applicant is the spouse of the review applicant and satisfies cl 309.211(2) and therefore cl 309.211. The Tribunal finds that at the time of decision, the visa applicant continues to satisfy cl 309.211.
42. Therefore, the visa applicant satisfies both cl 309.211 and cl 309.221.

Secondary visa applicants

43. The Tribunal is satisfied on the basis of the application forms that the sponsorship referred to in cl 309.321 in respect of the person who satisfies the primary criteria includes sponsorship of the second named visa applicants, Miss Barsa Purja and Mr Bibek Purja. Accordingly, the Tribunal finds that the second named visa applicants met cl 309.312 at the time of application.

44. In considering whether the secondary visa applicants meet the time of decision criteria in cl 309.321 the Tribunal was mindful Miss Barsa Purja was now aged 23 and was no longer able to meet Reg 1.12 Member of the Family Unit definition because she was not able to meet the reg 1.05A(1)(b) definition of dependent.
45. Given the findings above, the appropriate course is to remit the application for the visas to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

46. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl 309.211 of Schedule 2 to the Regulations; and
- cl 309.221 of Schedule 2 to the Regulations

with an additional direction that the secondary visa applicants meet the following:

- cl 309.312 of Schedule 2 to the Regulations.

Moirá Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).